

Kwayder (Migration) [2024] AATA 349 (31 January 2024)

1.

2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Ahmad Kwayder
VISA APPLICANT:	Mr Mohamad Kowayder
REPRESENTATIVE:	Ms Katrina Feghali (LPN 5511331)
CASE NUMBER:	2303957
HOME AFFAIRS REFERENCE(S):	BCC2023/1200142
MEMBER:	Peter Papadopoulos
DATE:	31 January 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Visitor (Class FA) visa.

Statement made on 31 January 2024 at 10:16am

CATCHWORDS

MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – Tourist stream – bogus document – bank statement – ‘given or caused to be given’ – reliance on agent – role played in the preparation and lodgment of visa application – visa applicant’s knowledge and complicity – whether visa application invalidated – waiver of requirement – compelling or compassionate circumstances that affect the interests of an Australian citizen – procedural matters – technical issues during the hearing – interpretation difficulties – request to reconstitute the matter to a different Member – case management hearing – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 600.213; Schedule 4, PIC 4020

CASES

Kaur v MIBP [2017] FCAFC 184

Maharjan v MIBP [2017] FCAFC 213

Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 3 March 2023 to refuse to grant the visa applicant a Visitor (Class FA) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The visa applicant applied for a Subclass 600 (Visitor) visa (the visa) on 17 February 2023. At the time the visa application was lodged, Class FA contained only one visa subclass, namely Subclass 600 (Visitor).
6. The visa applicant indicated in the visa application form that they were seeking to satisfy the criteria for the Tourist stream. Therefore, the criteria for grant of the visa in this case are set out in Subdivisions 600.21 and 600.22 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). Clause 600.213 within Subdivision 600.21 provides that the visa applicant must meet a range of public interest criteria specified within Schedule 4 to the Regulations, including public interest criterion 4020 (PIC 4020). PIC 4020 is set out in the Attachment to this decision.
7. The delegate refused to grant the visa on the basis that the visa applicant did not meet PIC 4020.
8. The review applicant sought review of the delegate's decision and was represented by Ms Katrina Feghali, a legal practitioner.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

RELEVANT LAW

10. The issue in this case is whether the visa applicant meets PIC 4020 as required by cl 600.213(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B).

PROCEDURAL MATTERS, EVIDENTIARY MATERIAL AND SUBMISSIONS

12. The visa application

13. The visa application was made online through an immiAccount held by a self-registered user with the user identification of: sultanaahmad@2016.
14. The visa application was validly made on 17 February 2023 whereby the relevant criteria, including the payment of the visa application charge, prescribed within Schedule 1 to the Regulations had been met. The Subclass 600 visa application form was submitted through the Department's online immiAccount portal at 12.22pm AEDT on 17 February 2023.
15. Notably, the following evidentiary material was uploaded through the immiAccount portal in advance of the lodgment of the visa application on 2 June 2022:
- the visa applicant's National ID Card;
 - a letter from the visa applicant's employer regarding his current position dated 31 May 2022; and
 - a National Australia Bank account statement for an account in the name of the review applicant and Ms S Kowaider for the period 1 January 2022 and 10 March 2022;
 - a BML bank account statement in the name of the visa applicant and dated 30 May 2022 (BML bank statement).
16. No submissions were provided to the Department in support of the visa application.
17. On 21 February 2023, a Departmental officer conducted a telephone interview with the visa applicant. According to Departmental file note records of that interview, the visa applicant told the officer that:
- he never held a bank account at the BML bank in Lebanon;
 - he held a bank account with Bankmed in Lebanon;
 - Mr Ghazwan Ali Hawat, a travel agent in Lebanon to whom he had paid about \$100 to assist with lodging the visa application, obtained the BML bank statement and told him that it was needed 'to support and strengthen the application';
 - he did not know where Mr Hawat had procured the bank statement;
 - he trusted Mr Hawat and agreed with his advice that the bank statement was to be uploaded in support of the visa application because it would 'strengthen' his visa application;
 - he sent all the visa application supporting documents to his Australian relatives as he was 'not knowledgeable in paperwork';

- he knew that the BML bank statement had been issued a year earlier but did not know that his brother in Australia had only recently paid the visa application charge to the Department in order to formally lodge the visa application.

18. On 24 February 2023, the Department sent a letter to the visa applicant in which he was invited to comment upon whether the bank statement was a bogus document and provide submissions in relation to whether he met PIC 4020. This letter relevantly read, in part, as follows:

On 17 February 2023, the applicant lodged a subclass 600 Visitor visa. As part of the application, the applicant submitted a document purporting to be a bank statement issued by the BML Bank, Tripoli branch.

The department sought to verify the information provided in the bank statement provided by BML Bank. In reviewing the document, the department has identified formatting errors, which would not be found in a genuinely issued bank statement by a professional financial institution. Specifically, the BML Bank statement provided by the applicant does not conform with the format of standard genuine bank statements. On 21 February, the department contacted the applicant by telephone. The applicant confirmed over the phone that he engaged with an agent who uploaded this bank statement on the applicant's behalf to further support his application. The applicant further confirmed that he only holds one bank account with BankMed and he was unsure what the agent had uploaded on his behalf.

I have therefore made the preliminary assessment that the BML Bank statement provided by the applicant is a bogus document. You may therefore fail to meet PIC4020(1)(a).

19. The Department did not receive a response to its letter of 24 February 2023.

20. On 3 March 2023, the delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 600.213(1) because the applicant failed to satisfy PIC 4020. The delegate found that the applicant did not meet the requirements of PIC 4020(1), and that there were no circumstances before the delegate which would warrant a waiver under PIC 4020(4).

21. **The review application**

22. On 20 March 2023, the review applicant lodged an application for review of the delegate's decision with the Tribunal.

23. *Pre-hearing submissions and evidence*

24. On 1 August 2023, the Tribunal invited the review applicant to provide information in relation to the visa applicant's ability to meet relevant requirements within PIC 4020. By way of response, on 15 August 2023, the representative provided the Tribunal with a copy of the review applicant's statutory declaration of 15 August 2023 in which the review applicant declared, among other things, that:

- the BML bank statement was bogus, however the visa applicant had only given Mr El Hawat an authentic BankMed bank account statement to be used in support of the visa application;
- the visa applicant told the Department by telephone on 21 February 2023 that he only held 'one bank account with BankMed and he was unsure of any other bank accounts or statements submitted to the Department of Home Affairs';

- the visa applicant 'had no reason to provide a bogus bank statement to the Department' as he had provided Mr El Hawat evidence of genuine funds held in his BankMed account;
- other villagers in Lebanon have told him that Mr El Hawat has been detained by the Lebanese authorities because he has manufactured bogus documents for other Australian visa applicants whose visa applications have been refused by the Department, including Mr Fadi Hajobeid who is willing to provide evidence to the Tribunal.

25. A range of supporting documents were annexed to this statutory declaration, most of which were relevant for the purposes of demonstrating the visa applicant's ability to meet visa eligibility criteria other than cl 600.213(1). That said, the following relevant documents relating to the assessment of the visa applicant's ability to meet PIC 4020 were annexed to the statutory declaration:

- The visa applicant's BankMed bank account statement dated 9 August 2023 for the period between 9 August 2022 and 8 August 2023;
- The visa applicant's BankMed bank account statement dated 9 August 2023 for the period between 28 July 2023 and 9 August 2023;
- Original and translation of a letter of support from Mahmoud Dahman, Town Councillor of El Menieh dated 2 August 2023 in which it was stated that:
 - '[the visa applicant] had submitted a travel application to the Australian Embassy, but the travel agency attached an unallowed document to the application which led to the refusal of the latter, where the applicant did not know that the travel agent had attached the unallowed document.'
 - ...
 - Note that the authorities had arrested the travel agent Ghazwan EL HAWAT on charges that he was forging bank statements and submitting them to the Ministry of the Interior without informing the visa applicants.'
- Lebanese passport biodata page for Fadi Hajobeid (DOB 1 January 1976).

26. *The first hearing*

27. At a hearing on Friday 13 October 2023 (the first hearing), the review applicant appeared before the Tribunal in person to give evidence and present arguments. The Tribunal also received oral evidence over the telephone from the visa applicant in Lebanon. The first hearing was conducted with the assistance of a female interpreter in the Arabic (Lebanese) and English languages. The Tribunal was advised that Mr Hajobeid was no longer a witness and would not be providing oral evidence to the Tribunal.
28. Various difficulties arose during the first hearing which impeded the Tribunal's ability to conduct the hearing within the 90 minute period allocated between 2pm and 3.30pm. Initially, the hearing was delayed as the Tribunal's computer crashed during the making of preliminary remarks at the outset of the hearing. Once that matter had been rectified, the Tribunal then proceeded to attempt to contact the visa applicant in Lebanon by telephone. After some further delay arising out of difficulties with the Tribunal's telephone equipment, the line was successfully connected and the Tribunal began taking evidence from the visa applicant in Lebanon. Regrettably, the telephone connection with the visa applicant in Lebanon was, at various points during the call, of poor quality, thereby making it difficult for

the visa applicant and interpreter to hear each other. The process was further frustrated by repeated attempts by the Tribunal to ensure the visa applicant heard and understood the questions being put to him along with attempts by the Tribunal to verify with the visa applicant that it had understood his responses. It eventually became apparent to the Tribunal that there was a distinct possibility that the Tribunal's questions and the visa applicant's evidence was not being meaningfully conveyed through the interpreter. Various attempts were made by the Tribunal to overcome this difficulty, including the paraphrasing and checking of the visa applicant's responses with him along with requests, helpfully prompted by the representative, for the visa applicant to try and speak in shorter sentences when giving his evidence so as to allow the interpreter a reasonable opportunity to undertake her duties more effectively. Nevertheless, the interpreter then became visibly distressed and, at the Tribunal's suggestion, an adjournment of the hearing for five minutes was granted to allow the interpreter to have a break. During that adjournment, the interpreter, the review applicant and the representative left the Tribunal's premises without telling me and did not return.

29. *Case management hearing*

30. Given the difficulties that transpired during the first hearing, a Tribunal officer contacted the representative during the morning of Monday 16 March 2023 to propose arrangements for another hearing that would entail the use of a different interpreter along with the provision of facilities to allow the visa applicant to give evidence by video over the MS Teams technology platform. Despite attempts by the Tribunal officer to convey these proposed arrangements to the representative, the representative insisted that the case be reconstituted to another Member as that was her client's 'strong preference'. The Tribunal officer advised the representative put her request in writing to the Tribunal along with any reasons to support that request.

31. At 11.18am on 17 October 2023, the representative sent an email to the Tribunal in the following terms:

32. We refer to the above matter and are instructed by our client due to the events that unfolded on Friday 13 October 2023, the day of his hearing, we have been instructed to request that the Tribunal Member be re-constituted.

33. We look forward to receiving correspondence in relation to this matter.

34. After considering this request, the Tribunal sent a letter to the review applicant on 25 October 2023 in which they were invited to attend a case management hearing to be held between 2pm and 3pm on 9 November 2023. Relevantly, that letter read, in part, as follows:

The Tribunal has considered your request to reconstitute the matter and the Member acknowledges the difficulties experienced during the hearing on 13 October 2023. The Tribunal has determined that the appropriate course would be for the Member to proceed with the matter on the basis that a different interpreter is made available at any further hearing(s) and that, where possible, any proposed witness in Lebanon provide evidence using the MS Teams platform instead of telephone.

...

The purpose of the case management hearing is to deal with procedural matters in relation to your application for review and, in particular, narrow the issues to be determined, discuss what further information would be of assistance to the Tribunal and set a timetable for the proceedings. The Member may also discuss arrangements for the hearing and you may also wish to raise any issues relating to the conduct of the proceedings with the Member should you wish to do so.

Please note you are not required to participate in the case management hearing as the

directions can be provided to your appointed representative, Ms Katrina Feghali. However, should you wish to participate in the case management hearing, please advise as soon as possible so that appropriate arrangements can be made.

35. The representative elected to attend the case management hearing by telephone on behalf of the review applicant. At the outset of the case management hearing on 9 November 2023, the Tribunal confirmed with the representative that the review applicant had instructed her to request his matter be reconstituted to another Member and noted that she had not provided any specific reasons or arguments in writing to the Tribunal since the first hearing in relation to this recusal request. The Tribunal then explained that it had reviewed the audio recording of the first hearing and acknowledged the difficulties that were experienced during that hearing. The Tribunal explained its view that those difficulties arose out of technical and related issues during the hearing including, but not limited to, the Member's computer malfunctioning, the difficulties in connecting with the visa applicant in Lebanon by telephone and the subsequent interpretation difficulties that arose, partly due to the poor quality of the telephone connection which impeded the flow of communication between the visa applicant and the Tribunal through the interpreter. The Tribunal also noted two instances where it became apparent that the interpreter had erred in her interpretation of the visa applicant's evidence and the Tribunal had intervened to correct these errors. The Tribunal also indicated that it became apparent near the end of the first hearing that the interpreter was experiencing some form of difficulty that resulted in her leaving the Tribunal during an adjournment. The Tribunal told the representative that these matters, when collectively considered, have led it to form the view that the appropriate course of action would be to ignore all of the evidence provided at the first hearing by the visa applicant and have a fresh hearing with another interpreter and, if possible, connect with the visa applicant via MS Teams during that hearing so he could see the review applicant, the interpreter, the representative, and the Member when giving his evidence. The Tribunal also reminded the representative that the review applicant was welcome to bring a support person to the next hearing should they wish to do so. The Tribunal then invited the representative to make oral submissions in relation to the recusal request.
36. By way of response, the representative:
- thanked the Tribunal for its explanation of its position and undertook to relay this to the review applicant;
 - explained that she spoke Arabic and acknowledged the serious communication difficulties during the first hearing and that, in light of the Tribunal's proposed arrangements for a further hearing, she was confident that she would be able to assure the review applicant that it was not necessary for me as the Presiding Member to recuse myself from the case;
 - agreed to facilitate a test of the MS Teams platform technology with the visa applicant in Lebanon before the next hearing and advise the Tribunal accordingly;
 - acknowledged the Tribunal's assurance that in the event there were any interpretation issues at the next hearing, she was welcome to raise these with me as and when they arose.
37. On this basis, the Tribunal determined that recusal was not required and that it would continue to hear the matter. Notably, the Tribunal has not been required to revisit this determination as it has not received any submissions or other material in support of the recusal request following the case management hearing.

38. By way of narrowing the issues to be determined, the Tribunal raised with the representative at the case management hearing that it proposed to examine the following three key questions:

- Is the BML bank statement that was lodged with the Department in support of the visa application a bogus document? In this regard, the Tribunal invited the provision of legal submissions addressing this question.
- If the BML bank statement is a bogus document, has the visa applicant given it, or caused it to be given, to the Department? In this regard, the Tribunal invited the provision of evidence in relation to:
 - the provenance of the bogus document and how it was procured;
 - who obtained the bogus document, who passed it onto whom and when, and who then uploaded it to the online visa application; and
 - the visa applicant and review applicants' knowledge of the above matters.

39. The Tribunal also invited the provision of written argument by way of legal submissions if it was to be contended that:

- the visa applicant had not given the bogus document, or caused it to be given, to the Department; and/or
- third party fraud had been involved in this case in a manner that affected its validity.
- If PIC 4020(1) has been met, does the visa applicant satisfy the waiver requirements in PIC 4020(4)? In this regard, the Tribunal noted the statements made in paragraph 34 of the review applicant's statutory declaration of 15 August 2023 but invited the provision of further legal submissions and evidence on this issue.

40. The representative indicated that, subject to her client's instructions, she would provide the Tribunal with all submissions and evidence by 7 December 2023 so as to allow the Tribunal adequate time to consider this material before a second hearing of three hours duration on 14 December 2023.

41. *Further evidentiary material and submissions*

42. On 28 November 2023, the representative provided the Tribunal with a letter in which various submissions were made by way of addressing the three key questions raised at the case management hearing. Where relevant, these submissions are considered below.

43. *The second hearing*

44. At a hearing on 14 December 2023 (the second hearing), the review applicant appeared before the Tribunal in person to give evidence and present arguments. The representative also attended the second hearing in person. The review applicant confirmed that he did not require the Tribunal to take evidence from any other witnesses. Unfortunately, despite the Tribunal having made the necessary arrangements, the visa applicant was unable to connect to the second hearing using the MS Teams technology platform. Nevertheless, the Tribunal persisted by then telephoning the visa applicant in Lebanon. The connection was successful and the line was clear, thereby enabling the visa applicant to give evidence without difficulty. The second hearing was conducted with the assistance of a male

interpreter in the Arabic (Lebanese) and English languages. The review applicant and the visa applicant confirmed that they did not have any problems understanding the interpreter. Where relevant, the oral evidence provided by the review applicant and the visa applicant during the second hearing is discussed in the Tribunal's findings and reasons below.

CONSIDERATION OF CLAIMS AND EVIDENCE

45. In determining whether the visa applicant meets PIC 4020, the Tribunal turns its consideration to the following three key questions:
- Is the BML bank statement that was lodged with the Department in support of the visa application a bogus document?
 - If the BML bank statement is a bogus document, has the visa applicant given it, or caused it to be given, to the Department?
 - If PIC 4020(1) has been met, does the visa applicant satisfy the waiver requirements in PIC 4020(4)?
46. **Is the BML bank statement that was lodged with the Department in support of the visa application a bogus document?**
47. The term 'bogus document' is defined in s 5(1) of the Act (see the Attachment to this decision).
48. According to the Departmental officer's file note, the visa applicant told the Departmental officer at interview on 21 February 2023 that he had never held a bank account at the BML bank in Lebanon. Both the review applicant and the visa applicant told the Tribunal at the second hearing that the visa applicant had never held a bank account at the BML bank in Lebanon. Furthermore, the representative has not provided any submissions to the Tribunal containing argument that the BML bank statement is not a bogus document.
49. Having considered the above matters, the Tribunal finds that the BML bank statement is a bogus document as it purports to have been, but was not issued, in respect of the visa applicant.
50. **If the BML bank statement is a bogus document, has the visa applicant given it, or caused it to be given, to the Department?**
51. Give the above finding, the Tribunal turns its consideration to whether the visa applicant has given the BML bank statement, or caused the BML bank statement to be given, to the Department.
52. At an interview with an officer of the Department on 21 February 2023, the visa applicant was asked various questions about his visa application. According to the Departmental officer's file note, the visa applicant told the Departmental officer at interview on 21 February 2023 that he had only held moneys in a BankMed bank account at the Minieh branch. When the officer informed the visa applicant that another bank statement had been provided in support of the application, the visa applicant replied:
53. The other bank statement provided by the agent Ghazwan El Hawat is to support and strengthen the application.

54. Relevant to the assessment of the present issue, the file note records the following discussion between the Departmental officer and the visa applicant, described as the principal applicant (PA) in the extract below:

55. *Why do you need another statement if you have a bank statement with Bank Med?*

56. PA: I don't know, he told me that he will strengthen my application and I accepted because I don't know much in documentation

57. *Did Ghazwan tell you from where he will obtain the bank statement?*

58. PA: No, it might be under his name.

59. *Did you accept that he puts documents under your name and you don't know from where he got them?*

60. PA: Yes, he told me that it will strengthen my application, I agreed, I did what he told me. He only put the bank statement, his well-known agent and he always applies for other people. I got him an employment letter and other documents and I have a Bank Med statement. If I knew it would jeopardize my application I wouldn't have agreed, I agreed with him because it was my first time uploading a bank statement and he told me not to worry because it is his job to do it.

61. *Advised PA to provide truthful info, advised that if he has a statement with Bank Med why would he accept to provide another statement from the agent?*

62. PA: I don't know, I trusted him because he knows how to do the paperwork, I didn't go with him to the bank but the rest of the papers I prepared them, they were 3 or 4 document. I don't know what happened, I thought he uploaded a Bank Med statement for me and I agreed that he uploads another bank statement to strengthen the application.

63. At the second hearing, the review applicant told the Tribunal that he neither communicated with Mr El Hawat nor lodged the visa application through an immiAccount. After being pressed to explain the degree of his and Sultana's involvement in the preparation and lodgment of the visa application, especially since the immiAccount user ID – sultanaahmad@2016 – contained both of their given names, the review applicant gave evidence that:

- he did not have access to an immiAccount;
- his wife Sultana had an immiAccount which only she could access;
- he had never directly communicated with Mr El Hawat;
- his wife Sultana had sent documents to Mr El Hawat through the immiAccount so that they could be used in support of the visa application;
- he did not obtain the BML bank statement, which he accepted was a bogus document, but suspected someone in the office of Mr El Hawat had done so;
- he did not know when the BML bank statement had been obtained;
- he did not know how to upload the BML bank statement to the immiAccount portal and his wife had told that him she had not done so;
- the visa applicant did not tell him about what was said during the telephone interview with the Departmental officer on 21 February 2023;

- he first found out that the BML bank statement had been provided to the Department in support of the visa application after the visa application had been refused on 3 March 2023.

64. At the second hearing, the visa applicant told the Tribunal that Mr El Hawat had helped prepare the visa application. He attended Mr El Hawat's office where they completed the visa application form but Sultana, the review applicant's wife, was 'the one who lodged and submitted the application online'. He claimed that he did not know when the BML bank statement had been obtained but believed Mr El Hawat was most likely the person who obtained that document because he was later found to have been involved in forging documents. Asked to explain why he told the Departmental officer during the telephone interview on 21 February 2023 that he knew Mr El Hawat had been involved in obtaining the BML bank statement, and appeared to accept Mr El Hawat's advice that providing it to the Department would 'strengthen the application', the visa applicant responded:

65. I did not know about this document, but the female officer asked me about this document many times over 20 minutes. Because she insisted so many times, in the end I said I knew about it although I didn't. Because she insisted, accidentally or involuntarily, it came out of me that I knew about it but I actually didn't know about it. I did not know then that it would get to the point that I have to go to court as a result of this and go to a tribunal and lodge an appeal in relation to this matter. I stated then because she insisted so much. I wanted to find a way out of that conversation so said I know about it, but in fact I did not know about this document.

66. At the conclusion of the second hearing and by way of utilising s 359AA of the Act, the Tribunal put to the review applicant various statements made by the visa applicant during the telephone interview with the Departmental officer on 21 February 2023 which indicated the visa applicant knew a bogus document had been provided to the Department when his visa application was lodged and that he had agreed with Mr El Hawat's advice to provide a bogus document in support of the visa application because that would 'strengthen the application'. After explaining why this information was relevant to the review and the consequences of the information being relied upon in affirming the decision under review, the review applicant elected to immediately respond. The review applicant told the Tribunal that the visa applicant may have given such information to the Departmental officer during the telephone interview possibly because of 'the pressure he was under and maybe he didn't know about how or what to say'.

67. Taking into account the material before the Tribunal, the Tribunal is prepared to accept that Mr El Hawat obtained the bogus document which was uploaded to the visa application. The Tribunal also finds that the review applicant and his wife Sultana had a role in the preparation and lodgment of the visa application, but it is not in a position to find that they were knowingly involved in the provision of the bogus document to the Department. While the Tribunal understands that the bogus document had been uploaded to an immiAccount, most likely registered to and accessed by the review applicant's wife, some nine months before the visa application was lodged, the Tribunal is not satisfied that the review applicant had any knowledge of that matter.

68. While it is not necessary to show that the bogus document was provided to the Department by Mr El Hawat with the visa applicant's knowledge and complicity, the document must still be 'given or caused to be given' by the visa applicant. This does not mean that the visa applicant needs to be aware that the bogus document has been given by Mr El Hawat, or that the visa applicant gave instructions to Mr El Hawat for the bogus document to be provided.¹ Nevertheless, the Tribunal has considered the evidence and submissions as it

¹See *Singh v MIBP* [2018] FCAFC 52 at [152]; *Singh v MIBP* [2015] FCCA 2776 at [49]; *Dhanuka v MICMSMA* [2019] FCCA 2849

relates to the visa applicant's knowledge and complicity and prefers the evidence detailed in the Departmental officer's file note in this regard.

69. The file note is a contemporaneous record of the conversation that transpired between the visa applicant and the Departmental officer on 21 February 2023. There is no persuasive evidence before the Tribunal to indicate that it is an inaccurate record of that conversation. The file note is lengthy, providing an almost verbatim record of the conversation. The file note clearly indicates that the visa applicant was aware before the lodgment of the visa application that Mr El Hawat had obtained, and would provide the Department with, a bank statement that was not in the visa applicant's name. On at least three occasions during that conversation, it is recorded that the visa applicant understood from Mr El Hawat that this bogus document would be provided to 'strengthen [the] application'.
70. The Tribunal acknowledges the visa applicant's claim at the second hearing that he was bullied, or at the very least harangued, by the Departmental officer into making a false statement during this interview. However, the Tribunal does not accept this. In rejecting this claim, the Tribunal notes the very belated manner in which it has been raised; and only after the Tribunal had brought the file note record to the visa applicant's attention during the second hearing. If indeed the visa applicant had been bullied or harangued into making such a false admission during the telephone interview, the Tribunal expects that he would have mentioned this to the review applicant, the review applicant's wife or the representative and that submissions would have been made in this regard at an earlier juncture. The Tribunal's position is underscored by the fact that this telephone interview was specifically referred to in the Department's letter of 24 February 2023 and the delegate's decision of 3 March 2023. In each of these documents, it had been clearly stated that the visa applicant had 'confirmed over the phone' with a Departmental officer on 21 February 2023 that he had engaged an agent who uploaded the bogus document 'on the applicant's behalf to further support the application'.
71. The Tribunal also acknowledges the various claims and arguments made whereby the visa applicant had no reason to lodge a bogus document given he had a legitimate operating bank account with BankMed. This contention is rejected given that the accepted evidence in relation to the file note which clearly indicates that the visa applicant knew that a bogus document would be provided to 'strengthen the application' and thereby supplement the legitimate BankMed that was to be provided to the Department.
72. In relation to claims and evidence pertaining to action taken against Mr El Hawat by the visa applicant and his family after the refusal to grant the visa, the Tribunal accepts that some complaints may have been made but has not been provided with any significant detail or documentary evidence about the nature and substance of those complaints. While the Tribunal is prepared to accept the claims and evidence in relation to Mr El Hawat being the subject of criminal penalty in Lebanon, this does not necessarily lead the Tribunal to find that the visa applicant had no knowledge of Mr El Hawat's dishonesty in connection with the preparation and lodgment of the visa application.
73. Accordingly, the Tribunal finds that the visa applicant has caused the BML bank statement to be given to the Department.
74. Therefore, the applicant does not meet PIC 4020(1).
75. For sake of thoroughness, the Tribunal notes that a visa application may be invalid where fraud has prevented the delegate from carrying out their functions or has stultified the visa application process.² However, given the above findings in relation to the visa applicant's

²*Maharjan v MIBP* [2017] FCAFC 213 at [113]

knowledge of, and complicity with, Mr El Hawat's fraudulent conduct, the Tribunal concludes that the visa application has not been invalidated by Mr El Hawat's conduct.

76. Should the requirements of PIC 4020(1) be waived?

77. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03 of the Regulations), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
78. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
79. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
80. There is no evidence before the Tribunal which suggests that there are any compelling circumstances that affect the interests of Australia.
81. In her letter of 27 November 2023, the representative detailed the following relevant compassionate or compelling circumstances pertaining to the review applicant who is an Australian citizen:
 - adverse financial impacts arising out of having to appeal the delegate's decision;
 - further financial implications upon the applicants 'as they seek further appeals to establish the provision of the bogus document';
 - the review applicant being barred from sponsoring other family members and friends for three years due to no fault of his own;
 - the review applicant's sponsorship record being tarnished due to no fault of his own;
 - adverse emotional impact upon the review applicant;
 - adverse impact upon the social reputation and integrity of the applicants.
82. Asked at the second hearing about how the refusal to grant the visa affects him, the review applicant told the Tribunal that he was psychologically tired and upset about the issue that had arisen because of Mr El Hawat. He said that the matter had not given rise to any adverse financial impact upon him but did make him feel stressed because it gave the impression that he and his brother would be seen as 'liars' when they did not have a role in what Mr El Hawat's travel agency had done.
83. The Tribunal has considered the evidence provided by the review applicant. The Tribunal has some sympathy for the review applicant. It found him to be a generally credible witness who was distressed by the refusal of his brother's visitor visa application. The Tribunal accepts that the review applicant has incurred some financial costs as a result of having to seek review before the Tribunal and may incur further costs, the amount of which has not

been specified or estimated. The Tribunal accepts the review applicant is sad that his brother cannot visit in the short term and is distressed as a result of having to seek review of the delegate's decision in order to restore his reputation and integrity.

84. The representative has not made clear, and it is not otherwise evident to the Tribunal on the basis of the material, how the circumstances in this case give rise to the review applicant becoming the subject of a sponsorship bar for three years. It is also unclear how the circumstances surrounding this case have either tarnished the review applicant's sponsorship record and what impact these circumstances would have upon the assessment of his eligibility to sponsor family members and friends in the future.
85. Having considered all the circumstances put to the Tribunal, it is not considered that there is sufficient evidence which indicates that there are compelling or compassionate circumstances that affect the interests of an Australian citizen which justify the granting of the visa.
86. Therefore, the requirements of PIC 4020(1) should not be waived.

87. **Conclusion**

88. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 600.213(1).

DECISION

89. The Tribunal affirms the decision not to grant the applicant a Visitor (Class FA) visa.

Peter Papadopoulos
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...